

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

## WES JOHN VANDEVOORT.

**Plaintiff,**

v.

NANCY BERRYHILL, Acting  
Commissioner of Social Security  
Administration.<sup>1</sup>

Defendant.

CASE NO. 3:16-CV-05493-DWC

## ORDER ON PLAINTIFF'S COMPLAINT

Plaintiff filed this action, pursuant to 42 U.S.C § 405(g), seeking judicial review of the denial of Plaintiff’s application for Disability Insurance Benefits (“DIB”). The parties have consented to proceed before a United States Magistrate Judge. *See* 28 U.S.C. § 636(c), Fed. R. Civ. P. 73 and Local Magistrate Judge Rule MJR 13. *See also* Consent to Proceed before a United States Magistrate Judge, Dkt. 6.

<sup>23</sup> <sup>24</sup> <sup>1</sup> Nancy Berryhill is substituted for her predecessor, Carolyn W. Colvin, as Acting Commissioner of Social Security. Fed. R. Civ. P. 25(d).

1 After reviewing the record, the Court concludes the Administrative Law Judge (“ALJ”)  
 2 did not err by declining to obtain a consultative examination or additional medical expert  
 3 testimony. The ALJ also did not err by finding Plaintiff failed to meet the requirements of a  
 4 listing, by discounting Plaintiff’s subjective symptom testimony, or by finding Plaintiff was  
 5 capable of performing work existing in significant numbers in the national economy. Therefore,  
 6 this matter is affirmed pursuant to sentence four of 42 U.S.C. § 405(g).

7 **PROCEDURAL& FACTUAL HISTORY**

8 On August 16, 2013, Plaintiff filed an application for DIB, and on October 23, 2013,  
 9 Plaintiff amended his application. *See* Dkt. 9, Administrative Record (“AR”) 456-59. Plaintiff  
 10 alleges he became disabled on April 1, 2012, due to posttraumatic stress disorder (“PTSD”),  
 11 carpal tunnel syndrome, anxiety, history of pulmonary embolism, mood disorder, bilateral  
 12 shoulder impingement, lumbosacral strain, limited motion of the right hip, patella femoral  
 13 syndrome (bilateral), and chronic prostatitis. *See* AR 458, 488. Plaintiff’s application was denied  
 14 upon initial administrative review and on reconsideration. *See* AR 319-45. A hearing was held  
 15 before an ALJ on September 9, 2014, at which Plaintiff, represented by counsel, appeared and  
 16 testified. *See* AR 210. Based on the content of the first hearing, Plaintiff filed objections to the  
 17 testimony of the Vocational Expert, Steve Duchesne. AR 19-20. The ALJ held a supplemental  
 18 hearing on June 10, 2015, at which Plaintiff, Mr. Duchesne, and Dr. Joseph Moisan, a second  
 19 Vocational Expert, appeared and testified. AR 72.

20 On December 23, 2015, the ALJ found Plaintiff was not disabled within the meaning of  
 21 Sections 216(i) and 223(d) of the Social Security Act. AR 61. Plaintiff’s request for review of the  
 22 ALJ’s decision was denied by the Appeals Council on April 20, 2016, making that decision the  
 23 final decision of the Commissioner of Social Security (the “Commissioner”). *See* AR 1, 20  
 24

1 C.F.R. § 404.981, § 416.1481. On June 17, 2016, Plaintiff filed a complaint in this Court seeking  
 2 judicial review of the Commissioner's final decision.

3 Plaintiff argues the denial of benefits should be reversed and remanded for further  
 4 proceedings, because the ALJ: 1) failed to resolve an ambiguity in the medical evidence by  
 5 obtaining an additional consultative examination; 2) improperly found Plaintiff did not meet the  
 6 requirements of a Listing; 3) improperly discounted Plaintiff's subjective symptom testimony; 4)  
 7 failed to account for Plaintiff's chronic pain in the residual functional capacity ("RFC"); and 5)  
 8 failed to support his finding at Step Five with substantial evidence. Dkt. 13, pp. 1-2.

#### STANDARD OF REVIEW

9 Under 42 U.S.C. § 405(g), this Court may set aside the Commissioner's denial of social  
 10 security benefits only if the ALJ's findings are based on legal error or not supported by  
 11 substantial evidence in the record as a whole. *Bayliss v. Barnhart*, 427 F.3d 1211, 1214 n.1 (9th  
 12 Cir. 2005) (*citing Tidwell v. Apfel*, 161 F.3d 599, 601 (9th Cir. 1999)). "Substantial evidence" is  
 13 more than a scintilla, less than a preponderance, and is such "relevant evidence as a reasonable  
 14 mind might accept as adequate to support a conclusion." *Magallanes v. Bowen*, 881 F.2d 747,  
 15 750 (9th Cir. 1989) (*quoting Davis v. Heckler*, 868 F.2d 323, 325-26 (9th Cir. 1989)).

#### DISCUSSION

##### I. Whether the ALJ Erred by Failing to Order a Physical and Mental Consultative Examination

19 Plaintiff argues the ALJ erred by failing to order physical and mental consultative  
 20 examinations, or otherwise failing to call an expert in mental health to testify at a supplemental  
 21 hearing. Specifically, Plaintiff argues the testimony of consulting cardiologist Dr. Alan West,  
 22 M.D. at Plaintiff's first hearing created an ambiguity which triggered the ALJ's duty to develop  
 23 the record. Dkt. 13, pp. 6-9.  
 24

1 During Plaintiff's first hearing, the ALJ called Dr. West as a consulting medical expert  
2 witness to offer an opinion as to Plaintiff's functional limitations. AR 211-37. Of relevance to  
3 this analysis, Dr. West testified to several issues:

- 4 • Dr. West summarily opined that the significant mental health issues reflected in  
5 the medical records "may in fact be at the level of the Commissioner's . . .  
6 listings." AR 218.
- 7 • Dr. West opined to certain exertional limitations, such as a limitation to light  
8 work with the additional restriction that Plaintiff could stand/walk no more than  
9 four hours in an eight-hour workday, and could not push, pull, or lift objects  
10 overhead. AR 220, 231.
- 11 • Dr. West opined to certain postural limitations, such as no more than occasional  
12 climbing of ramps, stairs, ladders, ropes, and scaffolds; occasional stooping,  
13 kneeling, crouching, and crawling; and no balancing. AR 220.
- 14 • Dr. West opined to certain manipulative limitations, such as occasional handling  
15 and fingering. AR 220-21.
- 16 • Throughout his testimony Dr. West also indicated he believed a consultative  
17 physical examination would clarify whether and to what extent Plaintiff's carpal  
18 tunnel syndrome would cause manipulative limitations. AR 223, 229, 237.

19 Though the ALJ gave significant weight to Dr. West's exertional limitations, the ALJ  
20 discounted Dr. West's opinion as to Plaintiff's mental health for three reasons:

21 [1] Dr. West's primary specialty is cardiovascular disease, with a secondary  
22 specialty in internal medicine. [AR 419] His expertise therefore does not include  
23 mental health issues. The undersigned finds it doubtful that he would have  
24 occasion in particular to study the mental health listings and therefore concludes  
that the doctor is not qualified to provide a medical opinion on this issue. [2] Furthermore, as discussed throughout this decision and specifically in the

1 paragraphs immediately above, neither the claimant's symptoms [3] nor his  
 2 reported activities satisfy the 12.00 listings. The undersigned therefore gives very  
 3 little weight to Dr. West's opinion regarding the claimant's mental health  
 4 impairments.

5 AR 28-29. The ALJ also discounted Dr. West's opinion as to Plaintiff's postural and  
 6 manipulative limitations, due to inconsistencies with Plaintiff's activities of daily living, as well  
 7 as inconsistencies with the medical record. AR 51.

8       The ALJ "has an independent duty to fully and fairly develop the record." *Tonapetyan v.  
 9 Halter*, 242 F.3d 1144, 1150 (9th Cir. 2001) (internal citations and quotations omitted). This duty  
 10 exists even when the claimant is represented by counsel. *Brown v. Heckler*, 713 F.2d 411, 443  
 11 (9th Cir. 1983). "An ALJ's duty to develop the record further is triggered only when there is  
 12 ambiguous evidence or when the record is inadequate to allow for proper evaluation of the  
 13 evidence." *Mayes v. Massanari*, 276 F.3d 453, 460 (9th Cir. 2001). For example, this Court has  
 14 previously found that, where a treating rheumatologist's notes were indecipherable and illegible,  
 15 the ALJ had a duty to re-contact the physician to determine whether Plaintiff's fibromyalgia  
 16 constituted a medically determinable impairment pursuant to SSR 12-2p. *See Williams v. Colvin*,  
 17 2015 WL 7018724, at \*\*3-4 (W.D. Wash. Nov. 10, 2015). Also, where an ALJ relies on a  
 18 medical expert who indicates the record is insufficient to render a diagnosis, the ALJ must  
 19 develop the record further. *See Tonapetyan v. Halter*, 242 F.3d 1144, 1150 (9th Cir. 2001). But,  
 20 where the record, taken as a whole, is adequate to evaluate a claimant's alleged impairment, the  
 21 ALJ's duty to develop the record is not implicated. *See, e.g., Baghoomian v. Astrue*, 319  
 22 Fed.Appx. 563, 566 (9th Cir. 2009); *H'Oar v. Barnhart*, 51 Fed.Appx. 731, 732 (9th Cir. 2002).

23       The *Tonapetyan* case is particularly instructive. In *Tonapetyan*, the ALJ relied heavily on  
 24 the opinion of a consulting medical expert. *Tonapetyan*, 242 F.3d at 1150. However, the  
 consulting medical expert repeatedly expressed his concern that the record was insufficient to

1 allow him to render an opinion on some of Plaintiff's alleged severe impairments. *Id.* Further, the  
2 medical expert explicitly recommended the ALJ obtain additional medical evidence from the  
3 claimant's treating psychologist. *Id.* By giving great weight to the consulting medical expert yet  
4 failing to follow through with the consulting expert's recommendations, the Ninth Circuit found  
5 the ALJ failed to follow his independent duty to develop the medical record. *Id.* at 1151.

6 Here, by contrast, Dr. West did not suggest additional psychological examinations were  
7 necessary to evaluate whether Plaintiff met the requirements of a mental health listing. Nor did  
8 the ALJ rely on Dr. West's opinions concerning Plaintiff's mental health. Rather, Dr. West  
9 offered a vague and conclusory opinion on the issue of Plaintiff's mental health, without  
10 identifying which mental health listing he believes Plaintiff satisfied. AR 218. Further, Dr. West  
11 acknowledged he was not a mental health expert, and indicated he did not feel he was qualified  
12 to render a more thorough opinion. AR 218.

13 Importantly, the ALJ cited to substantial evidence to discount this aspect of Dr. West's  
14 opinion. *See* AR 28, 50-51. The ALJ considered the criteria enumerated in paragraphs A, B, and  
15 C of listings 12.02, 12.04, 12.06, and 12.09, and found Plaintiff had no more than mild  
16 difficulties in activities of daily living, moderate difficulties in social functioning, moderate  
17 difficulties in concentration, persistence, or pace, and no episodes of decompensation of  
18 extended duration. AR 27-28. In making these findings, the ALJ cited to evidence Plaintiff's  
19 social functioning and activities of daily living were not significantly impacted. For instance,  
20 Plaintiff consistently reported he engaged in outdoor and indoor home maintenance activities,  
21 worked as the stay-at-home parent for two young children, and volunteered at the American  
22 Legion. AR 27, 675, 697-98, 728, 745, 1920. The ALJ also noted Plaintiff socialized with  
23 friends, family, and strangers, including visiting his neighbors, socializing at the American  
24

1 Legion, and going camping with friends. AR 27-28, 675, 697-98, 728, 745, 1920. Finally, the  
 2 ALJ noted medical examinations revealed intact cognition during evaluations for traumatic brain  
 3 injury. AR 28. The ALJ indicated these findings contradicted Dr. West's opinion Plaintiff met  
 4 the criteria of an unspecified mental health listing.<sup>2</sup>

5 As for physical limitations, Dr. West indicated he would need an additional consultative  
 6 examination in order to assess whether Plaintiff's carpal tunnel syndrome imposed restrictions on  
 7 Plaintiff's functioning. AR 223, 229, 237. However, unlike the ALJ in *Tonapetyan*, the ALJ in  
 8 this case explicitly discounted Dr. West's opinion Plaintiff was limited to occasional  
 9 manipulative activities, as Dr. West's opinion was inconsistent with the medical evidence of  
 10 record. AR 51. The ALJ also exhaustively reviewed the balance of the medical evidence, and  
 11 concluded Plaintiff's carpal tunnel syndrome was not a severe impairment at Step Two of the  
 12 sequential evaluation. AR 23-25. Rather than demonstrating an ambiguity in the evidence or an  
 13 inadequate record from which the ALJ could reach a conclusion, Plaintiff has, at best, raised a  
 14 disagreement between his interpretation of the record and the ALJ's interpretation. But, when the  
 15 evidence admits of more than one rational interpretation, sole authority for interpreting the  
 16 evidence rests with the ALJ. *See Morgan v. Comm'r of Soc. Sec. Admin.*, 169 F.3d 595, 603 (9th  
 17 Cir. 1999).

18 Finally, Plaintiff makes an argument premised on the size of the medical record.  
 19 Essentially, Plaintiff argues that because the medical record was voluminous and addresses a  
 20 constellation of mental health issues, the ALJ needed to call a mental health expert or arrange for  
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22       <sup>2</sup> Plaintiff did not challenge these findings in his opening brief. Instead, Plaintiff argues  
 23 the ALJ's third reason for discounting Dr. West's opinion—that he was not a specialist in mental  
 24 health—was erroneous. Because the ALJ offered other reasons for discounting Dr. West's  
 opinion which Plaintiff did not challenge, the Court need not address this argument.

1 a consultative psychological examination in order to interpret this evidence. Dkt. 13, p. 7.

2 However, Plaintiff's argument is contrary to the regulations and this Circuit's case law. The ALJ

3 has the responsibility to determine credibility and resolve conflicts in the medical evidence.

4 *Reddick v. Chater*, 157 F.3d 715, 722 (9th Cir. 1988). Where the medical evidence in the record

5 is not conclusive, "questions of credibility and resolution of conflicts" are solely the functions of

6 the ALJ. *Sample v. Schweiker*, 694 F.2d 639, 642 (9th Cir. 1982). Determining whether or not

7 inconsistencies in the medical evidence "are material (or are in fact inconsistencies at all) and

8 whether certain factors are relevant to discount" the opinions of medical experts "falls within this

9 responsibility." *Morgan v. Comm'r of Soc. Sec. Admin.*, 169 F.3d 595, 603 (9th Cir. 1999).

10 Critically, the ALJ did not find the mental health records were inadequate to make a

11 determination regarding Plaintiff's disability. Rather, the ALJ disagreed with Plaintiff's

12 interpretation of the record, and gave significant weight to the opinions of state agency

13 psychological consultants Matthew Comrie, Psy.D. and Sharon Underwood, Ph.D. AR 54-55.

14 The ALJ considered Dr. Comrie and Dr. Underwood's review of the mental health records and

15 incorporated their moderate limitations in social interaction and concentration, persistence, and

16 pace into the RFC. See AR 29, 327-29, 342-43. The ALJ's decision was supported by substantial

17 evidence, and the ALJ did not err by failing to call an additional medical expert. See *Thomas v.*

18 *Barnhart*, 278 F.3d 947, 958 (9th Cir. 2002) (holding an ALJ's duty to develop the record was

19 not triggered where the ALJ discredited a physician's opinion, rather than finding the record was

20 inadequate to allow further review).

21 II. Whether the ALJ Erred by Failing to Find Plaintiff Met the Requirements of a  
Listing.

22 Plaintiff also argues that the ALJ erred by failing to find Plaintiff met the requirements of

23 a listing, based on the testimony of Dr. West.

24

The ALJ has the responsibility to determine whether a claimant has an impairment or combination of impairments that meets or equals a condition outlined in a Listing. See 20 C.F.R. §§ 404.1520(d), 416.920(d). See also *Caine v. Astrue*, 2010 WL 2102826, at \*6 (W. D. Wash. April 14, 2010). The Listings describe specific impairments that are considered “severe enough to prevent an individual from doing any gainful activity regardless of his or her age, education, or work experience.” 20 C.F.R. §§ 404.1525(a), 416.925(a). When assessing whether a medically determinable severe mental impairment meets the criteria of a listing, an ALJ must evaluate the degree of a claimant’s functional limitation across four factors: a claimant’s activities of daily living; social functioning; concentration, persistence, or pace; and episodes of decompensation.

11 Plaintiff argues the ALJ erred by disregarding Dr. West’s statement that Plaintiff may  
12 meet the requirements of a mental health listing. However, it is striking to the Court that Dr.  
13 West never states *which* mental health listing he believes Plaintiff satisfies. Indeed, Plaintiff  
14 himself never argues which mental health listing he believes he satisfies. *See Dkt. 13, pp. 6-9.*  
15 Plaintiff has the burden of demonstrating harmful error, and Plaintiff’s failure to articulate this  
16 argument with sufficient specificity means it is waived. *See Shinseki v. Sanders, 556 U.S. 396,*  
17 410 (2009). *See also Greger v. Barnhart, 464 F.3d 968, 973 (9th Cir. 2006), Bisuano v. Colvin,*

<sup>3</sup> Effective January 17, 2017, these four factors have been replaced with the following: a claimant’s ability to understand, remember, or apply information; interact with others; concentrate, persist, or maintain pace; and adapt or manage oneself. 20 C.F.R. § 404.1520a(b)(3) (2017). However, the recent revisions could not apply to the ALJ decision at issue before this court, as 42 U.S.C. § 405 does not contain any express authorization from Congress allowing the Commissioner to engage in retroactive rulemaking. *See Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 214-215 & n.3 (1988); *Garner v. Colvin*, 626 Fed.Appx. 699, 701 (9th Cir. 2015). *See also Portlock v. Barnhart*, 208 F.Supp.2d 451, 456 (D. Del. June 24, 2002) (holding the application of a recently-revised SSR to an applicant’s pending claim on appeal would constitute an impermissible retroactive application of an agency rule) (*citing Bowen*, 488 U.S. at 224).

1 584 Fed.Appx. 512, 514 (9th Cir. 2014). In any event, as described in Section I, above, the ALJ  
 2 analyzed Plaintiff's functional limitations for the criteria established in Listings 12.02, 12.04,  
 3 12.06, and 12.09, and found Plaintiff had no more than mild and moderate limitations, and no  
 4 episodes of decompensation, across the four factors. AR 27-28, 675, 697-98, 728, 745, 1920.  
 5 Plaintiff has not demonstrated how the ALJ's analysis was legally erroneous or unsupported by  
 6 substantial evidence.

7       III. Whether the ALJ Provided Specific, Clear, and Convincing Reasons, Supported by  
Substantial Evidence, for Discounting Plaintiff's Subjective Symptom Testimony.

8       If an ALJ finds a claimant has a medically determinable impairment which reasonably  
 9 could be expected to cause the claimant's symptoms, and there is no evidence of malingering, the  
 10 ALJ may reject the claimant's testimony only "by offering specific, clear and convincing  
 11 reasons." *Smolen v. Chater*, 80 F.3d 1273, 1284 (9th Cir. 1996) (*citing Dodrill v. Shalala*, 12  
 12 F.3d 915, 918 (9th Cir.1993)). *See also Reddick*, 157 F.3d at 722. However, sole responsibility  
 13 for resolving conflicting testimony and questions of credibility lies with the ALJ. *Sample v.*  
 14 *Schweiker*, 694 F.2d 639, 642 (9th Cir. 1999) (*citing Waters v. Gardner*, 452 F.2d 855, 858 n.7  
 15 (9th Cir. 1971); *Calhoun v. Balar*, 626 F.2d 145, 150 (9th Cir. 1980)). Where more than one  
 16 rational interpretation concerning a plaintiff's credibility can be drawn from substantial evidence  
 17 in the record, a district court may not second-guess the ALJ's credibility determinations. *Fair*,  
 18 885 F.2d at 604. *See also Thomas*, 278 F.3d at 954 ("Where the evidence is susceptible to more  
 19 than one rational interpretation, one of which supports the ALJ's decision, the ALJ's conclusion  
 20 must be upheld."). In addition, the Court may not reverse a credibility determination where that  
 21 determination is based on contradictory or ambiguous evidence. *See Allen v. Heckler*, 749 F.2d  
 22 577, 579 (9th Cir. 1984). That some of the reasons for discrediting a claimant's testimony should  
 23  
 24

1 properly be discounted does not render the ALJ's determination invalid, as long as that  
 2 determination is supported by substantial evidence. *Tonapetyan*, 242 F.3d at 1148.

3       The ALJ offered several reasons for discounting Plaintiff's subjective symptom  
 4 testimony. The ALJ found the objective medical evidence in the record was inconsistent with  
 5 Plaintiff's testimony concerning the severity of his pain and other symptoms. AR 30-48. *See*  
 6 *Regennitter v. Comm'r, Soc. Sec. Admin.*, 166 F.3d 1294, 1297 (9th Cir. 1998). "While  
 7 subjective pain testimony cannot be rejected on the sole ground that it is not fully corroborated  
 8 by objective medical evidence, the medical evidence is still a relevant factor in determining the  
 9 severity of the claimant's pain and its disabling effects." *See Rollins v. Massanari*, 261 F.3d 853,  
 10 857 (9th Cir. 2001) (*citing* 20 C.F.R. § 404.1529(c)(2)). For example, while Plaintiff testified to  
 11 side effects such as fatigue as a result of his medications, the ALJ notes the medical records  
 12 consistently indicate Plaintiff denied side effects from his medications. AR 745, 1827-28, 1836,  
 13 1905. Also, though Plaintiff testified to back and knee pain, the ALJ noted objective evidence  
 14 reflected normal range of motion and gait, as well as reports of minimal pain. AR 46, 676, 754,  
 15 1320, 1727, 1857, 1876, 2615, 2627, 2630. The ALJ also discounted Plaintiff's testimony  
 16 because it was inconsistent with his activities of daily living. *See Orn v. Astrue*, 495 F.3d 625,  
 17 639 (9th Cir. 2007). For example, the ALJ observed that despite Plaintiff's testimony he needed  
 18 to nap and/or lay down for four to six hours every day, he was the sole caregiver to preschool age  
 19 children during the period at issue. AR 47-48. 697-98. Third, the ALJ discounted Plaintiff's  
 20 testimony due to inconsistent statements he made during the hearing and to medical providers  
 21 concerning his drug and alcohol use. *See Tommasetti v. Astrue*, 533 F.3d 1035, 1039 (noting an  
 22 ALJ may rely on "ordinary techniques of credibility evaluation"). For example, while Plaintiff  
 23 testified he did not use marijuana until after it first became legal in Washington State (AR 267-  
 24

1 68), the record reflects marijuana use throughout the period at issue. AR 667,671, 679, 743, 948,  
 2 1263, 1863, 1866, 1876. These were specific, clear and convincing reasons for the ALJ to  
 3 discount Plaintiff's testimony, and the ALJ did not err by relying on them.

4 Notably, Plaintiff does not challenge any of the ALJ's reasons for discounting his  
 5 testimony. Instead, Plaintiff argues the ALJ's entire evaluation of Plaintiff's testimony is flawed  
 6 because "it is clear [the ALJ] had an agenda with the [medical expert, Dr. West] and was not  
 7 going to go beyond the reasons why he wanted a[ medical expert]." Dkt 13, pp. 11-12. Plaintiff's  
 8 argument has no merit. Plaintiff does not cite to any evidence in the record which would reflect  
 9 the ALJ's purpose in obtaining Dr. West's testimony was to pursue "an agenda" against Plaintiff.  
 10 Further, "[t]he purpose for which medical reports are obtained does not provide a legitimate  
 11 basis for rejecting them." *Lester v. Chater*, 81 F.3d 821, 832 (9th Cir. 1996). And, most  
 12 importantly, "ALJs and other similar quasi-judicial administrative officers are presumed to be  
 13 unbiased." *Rollins*, 261 F.3d at 857-58. Absent some evidence of actual improprieties in the  
 14 ALJ's conduct, Plaintiff's unsubstantiated allegations of the ALJ's purported "agenda" provides  
 15 no basis for this Court to reverse the ALJ's decision.

16 IV. Whether the ALJ Failed to Include all of Plaintiff's Credible Limitations in the  
Hypotheticals to the Vocational Expert, or Otherwise Erred in Relying Upon the  
Vocational Expert's Testimony.

18 If a claimant cannot perform his or her past relevant work, the ALJ must show there are a  
 19 significant number of jobs in the national economy the claimant is able to do at Step Five of the  
 20 sequential evaluation. *See Tackett v. Apfel*, 180 F.3d 1094, 1098-99 (9th Cir. 1999); 20 C.F.R. §  
 21 404.1520(d), (e), § 416.920(d), (e). The ALJ can do this through the testimony of a vocational  
 22 expert or by reference to the Medical-Vocational Guidelines (the "Grids"). *Osenbrock v. Apfel*,  
 23 240 F.3d 1157, 1162 (9th Cir. 2000); *Tackett*, 180 F.3d at 1100-1101.

1 Plaintiff offers several arguments as to why the ALJ's Step Five Finding was error. First,  
2 Plaintiff argues the ALJ failed to discuss the impact of chronic pain on Plaintiff's ability to  
3 perform work activity and thus propounded an incomplete hypothetical to the Vocational Expert.  
4 However, Plaintiff's argument is squarely contradicted by the ALJ's written decision, which  
5 discusses Plaintiff's complaints of pain in his knees, neck, mid back, low back, shoulders, and  
6 pain arising out of migraines. AR 25-26, 30, 46. The ALJ also discussed Plaintiff's claims that  
7 his chronic pain and associated pain medication imposed additional limitations, such as a  
8 requirement he lie down for four to six hours per day, and fatigue as a side effect of his pain  
9 medication. AR 30, 47-48. As discussed more thoroughly in Section III, above, the ALJ properly  
10 discounted Plaintiff's subjective symptom testimony, including Plaintiff's testimony concerning  
11 the effects and severity of his pain. Plaintiff has failed to demonstrate error in the ALJ's  
12 evaluation of Plaintiff's testimony concerning his chronic pain.

13 Second, Plaintiff argues the ALJ erroneously found Plaintiff could perform light work,  
14 despite the fact the ALJ limited Plaintiff to standing/walking for no more than four hours in an  
15 eight hour work day. However, Plaintiff's argument misstates both the ALJ's decision and the  
16 requirements of Social Security Ruling ("SSR") 83-10. SSR 83-10 indicates that for an  
17 individual to be able to perform the full range of light work, an individual must be able to lift no  
18 more than 20 pounds at a time, lift or carry no more than 10 pounds frequently, and must be able  
19 to stand or walk, off and on, for a total of approximately six hours in an eight-hour workday.  
20 SSR 83-10, available at 1983 WL 31251, at \*5-6. However, the ALJ did not find Plaintiff was  
21 capable of the full range of light work. AR 29. Instead, by finding Plaintiff could not stand or  
22 walk for more than four hours in an eight hour day, the ALJ found Plaintiff could perform less  
23 than the full range of light work. AR 29 ("the undersigned finds that the claimant has the [RFC]  
24

1 to perform light work . . . except that he [is] able to stand/walk for four hours in an 8-hour  
 2 workday . . . .”). Based on this RFC, the ALJ consulted with a Vocational Expert<sup>4</sup> in order to  
 3 determine whether there were a significant number of jobs in the national economy which  
 4 Plaintiff could perform. AR 57. This was proper.

5       The effect of a limitation to less than the full range of light work is illustrated by the  
 6 ALJ’s application of the Grids in this case. When an ALJ finds a claimant has the RFC to  
 7 perform the full range of sedentary, light, medium, or heavy work, and the claimant does not  
 8 have any other non-exertional limitations, the ALJ must consider whether the Grids direct a  
 9 finding of disability or non-disability. *See* 20 C.F.R. Part 404, Subpt. P, App. 2. However, an  
 10 ALJ cannot apply the Grids when a claimant is capable of performing some, but not all, of the  
 11 full range of sedentary, light, medium, or heavy work. *See Tackett*, 180 F.3d at 1103-04. Instead,  
 12 “when a claimant’s exertional limitation falls between two grid rules, the ALJ fulfills his  
 13 obligation to determine the claimant’s occupational base by consulting a vocational expert  
 14 regarding whether a person with claimant’s profile could perform substantial gainful work in the  
 15 economy.” *Thomas v. Barnhart*, 278 F.3d 947, 960 (9th Cir. 2002) (*citing Moore v. Apfel*, 216  
 16 F.3d 864, 870-71 (9th Cir. 2000)).

17       While the full range of light work requires a claimant to satisfy both the lifting/carrying  
 18 and standing/walking requirements, the Commissioner’s regulations do not require a claimant to  
 19 be able to lift twenty pounds occasionally and ten pounds frequently, as well as stand and/or  
 20 walk for at least six hours in an eight hour day, in order to be able to perform *any* light work.

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21  
 22       <sup>4</sup> As the ALJ explained in the written decision, the ALJ gave greater weight to the  
 23 opinion of Mr. Duchesne over Dr. Moisan. AR 58-60. Plaintiff does not directly challenge the  
 24 ALJ’s evaluation of Dr. Moisan’s opinion, but focuses entirely on perceived deficiencies in Mr.  
 Duchesne’s opinion. Thus, all references to Vocational Expert testimony in this section refer to  
 the testimony of Mr. Duchesne.

1 SSR 83-10, available at 1983 WL 31251, at \*5-6. In fact, SSR 83-10 discusses these  
 2 requirements in the disjunctive: “[e]ven though the weight lifted in a particular light job may be  
 3 very little, a job is in [the light work] category when it requires a good deal of walking or  
 4 standing.” *Id.* Thus, while the full range of light work requires both the ability to stand/walk and  
 5 the ability lift/carry to certain thresholds, individual jobs within the category may only require  
 6 one or the other. As this situation cannot be resolved solely by reference to the Grids, a  
 7 Vocational Expert is the appropriate source of information as to whether any light work jobs  
 8 exist which fit within the requirements of a claimant’s RFC. *Thomas*, 278 F.3d at 960.

9 Here, the ALJ recognized he was unable to apply the Grids. AR 57. The ALJ consulted  
 10 with a Vocational Expert to determine what, if any, light work Plaintiff was able to perform. AR  
 11 72-207, 283-84, 286. The Vocational Expert identified several light work jobs which were  
 12 consistent with the ALJ’s RFC finding. AR 57-58, 283-84, 286. Contrary to Plaintiff’s argument,  
 13 the ALJ properly found Plaintiff was not capable of the full range of light work, and properly  
 14 solicited Vocational Expert testimony to determine whether Plaintiff was capable of performing  
 15 any light work existing in significant numbers in the national economy.

16 Third, Plaintiff argues the Vocational Expert’s job number data was unsupported by  
 17 substantial evidence. However, a Vocational Expert’s “recognized expertise provides the  
 18 necessary foundation for his or her testimony.” *Bayliss*, 427 F.3d at 1217-18. Though Plaintiff  
 19 challenges the validity of the Vocational Expert’s testimony by reference to data contained in Job  
 20 Browser Pro, Plaintiff has offered, at most, an alternative interpretation of the record. *See, e.g.*,  
 21 *Valenzuela v. Colvin*, 2013 WL 2285232, \*4 (C.D. Cal. 2013) (“the data presented by plaintiff  
 22 was unaccompanied by any analysis or explanation from a vocational expert or other expert  
 23 source to put the raw data into context. . . . [further, the Job Browser Pro] data, at best, would  
 24

1 support an alternative finding regarding the number of job[s] . . . ."); *Merryflorian v. Astrue*,  
 2 2013 WL 4783069, \*4-5 (S.D. Cal. 2013) (citing numerous cases for the proposition that a  
 3 conflict between Job Browser Pro data and a Vocational Expert's testimony concerning job  
 4 numbers does not undermine the ALJ's reliance on the Vocational Expert). In the same vein, the  
 5 Vocational Expert testified that jobs such as "small products assembly" jobs can be performed by  
 6 an individual with the ALJ's RFC finding, and based this conclusion on his personal experience  
 7 and observations. AR 286-87. The ALJ did not err by relying on the Vocational Expert's  
 8 testimony on this point.

9       Fourth, Plaintiff argues the ALJ erred by finding Plaintiff was capable of performing the  
 10 sedentary job of "escort driver, DOT # 919.663-022," because the RFC finding limited him to  
 11 sit/stand for no more than four hours in an eight hour day. However, the ALJ did not find  
 12 Plaintiff was limited in his ability to *sit*. AR 29. The ALJ found Plaintiff was unable to stand or  
 13 walk for no more than four hours in an eight hour day. AR 29. As the ALJ observed during the  
 14 supplemental hearing, the fact the ALJ's RFC finding restricts Plaintiff to no more than four  
 15 hours of standing/walking in an eight-hour workday does not mean the ALJ found Plaintiff  
 16 limited in his ability to *sit*. AR 167. The Vocational Expert agreed, and noted that a limitation to  
 17 standing/walking for less than six hours in an eight-hour workday did not impact whether  
 18 Plaintiff could perform sedentary work. AR 168. Thus, Plaintiff has failed to demonstrate how  
 19 the ALJ erred by finding Plaintiff could perform the job of escort driver.

20       Fifth, Plaintiff argues the Vocational Expert improperly testified to the aggregate number  
 21 of assembly jobs available in several discrete occupations: "final assembler, optical goods, DOT  
 22 # 713.687-018; lens inserter, DOT # 713.687-026; fishing reel assembler; DOT # 732.684-062;  
 23 lamp shade assembler, DOT # 739.684-094; compact assembler, DOT # 739.687-066; wafer  
 24

1 breaker semi-conductor, DOT # 726.687-046.” AR 58. *See* AR 301-03. Plaintiff argues this was  
 2 improper, as 20 C.F.R. § 404.1566(b) requires a Vocational Expert to state the number of  
 3 available jobs for each individual occupation, rather than discussing them in aggregate. The  
 4 Court is not persuaded by Plaintiff’s argument. The regulation indicates “[w]ork exists in the  
 5 national economy when there is a significant number of jobs (*in one or more occupations*)  
 6 having requirements which you are able to meet with your physical or mental abilities and  
 7 vocational qualifications.” 20 C.F.R. § 404.1566(b) (emphasis added). The regulation also notes  
 8 “isolated jobs that exist only in very limited numbers in relatively few locations outside of the  
 9 region where you live are not considered ‘work which exists in the national economy.’” *Id.* 20  
 10 C.F.R. § 404.1566(b) does not address a situation presented by the Vocational Expert’s  
 11 testimony in this case. Here, the Vocational Expert noted there were approximately a half-dozen  
 12 jobs under the larger umbrella of “assembly” jobs which Plaintiff could perform. AR 284. In  
 13 aggregate, the Vocational Expert noted these totaled to approximately 30,000 jobs nationally and  
 14 500 jobs in the state of Washington. AR 284, 302-03. This testimony is consistent with the  
 15 definition of “work exist[ing] in the national economy,” as it describes work available in “one or  
 16 more occupations.” 20 C.F.R. § 404.1566(b).

17 Assuming for the sake of argument that the Vocational Expert’s testimony was error,  
 18 Plaintiff has failed to show harm. In addition to these aggregate assembly jobs, the Vocational  
 19 Expert also identified the following light and sedentary jobs Plaintiff could perform: Small  
 20 Products Assembler I, DOT # 706.684-022; Agricultural Sorter, DOT # 529.687-186;  
 21 Electronics Assembler, DOT # 726.687-010; and Escort Driver, DOT # 919.663-022. AR 57-58;  
 22 283-85. As Plaintiff has failed to demonstrate the ALJ erred by relying on these additional  
 23 identified occupations, the ALJ’s Step Five finding is still supported by substantial evidence, and  
 24

<sup>1</sup> any error in the ALJ's reliance on aggregate testimony from the Vocational Expert was harmless.

<sup>2</sup> See *Molina v. Astrue*, 674 F.3d 1104, 1117 (9th Cir. 2012) (noting error is harmless if it is

<sup>3</sup> "inconsequential to the ultimate nondisability determination").

4 Sixth, Plaintiff argues the ALJ erred by failing to account for repeated work absences in  
5 his hypothetical questions to the Vocational Expert. Dkt. 17, p. 5, n. 4. Plaintiff's argument is  
6 premised on the fact he lives approximately 55 miles from his treatment providers at the  
7 Veteran's Administration Hospital in Seattle, WA. Thus, the argument goes, he will frequently  
8 be absent from work for half days or whole days in order to attend medical appointments.  
9 Plaintiff, however, offers no argument or legal authority as to how the distance between his  
10 residence and his medical providers is a work-related limitation, let alone a relevant fact either  
11 the Commissioner or this Court may consider. Indeed, Social Security regulations explicitly state  
12 that for purposes of Step Five, “[i]t does not matter whether . . . [w]ork exists in the immediate  
13 area in which you live.” 20 C.F.R. § 404.1566(a)(1).<sup>5</sup>

Finally, the Court notes Plaintiff has attached appendices to his opening and reply briefs, which appear to contain vocational data obtained from Job Browser Pro and SkillTran, respectively. *See* Dkt. 13, Exh. 1; Dkt. 17, Exh. 1. These exhibits are improper. The Court is constrained to review whether the ALJ’s conclusion is supported by substantial evidence in the record as a whole. 42 U.S.C. § 405(g). *C.f., Taylor v. Comm’r, Soc. Sec. Admin.*, 659 F.3d 1228, 1232 (9th Cir. 2011). The Court lacks authority to supplement the administrative record on

<sup>5</sup> Plaintiff block-quotes this regulation in another section of his brief, yet deliberately omitted subsections (a)(1) through (a)(3). See Dkt. 13, p. 17. The Court notes Plaintiff's selective editing of the regulations relevant to the disposition of his case. See *Cherry v. City College of San Francisco*, 2006 WL 6602454, at \*7-8 (N.D. Cal., Jan. 12, 2006) (disapproving of plaintiffs' "clever use of brackets" in a brief in order to portray relevant regulations in a light more favorable to plaintiffs' position).

1 appeal, other than through the method articulated in Sentence Six of 42 U.S.C. § 405(g). As  
2 Plaintiff has not attempted to demonstrate how these appendices constitute new, material  
3 evidence, nor has Plaintiff shown good cause for failing to obtain this evidence at an earlier stage  
4 of the proceeding, the Court has not considered Plaintiff's proposed appendices in evaluating  
5 whether the ALJ's conclusion is supported by substantial evidence in the record as a whole. *See*  
6 *Mayes v. Massanari*, 276 F.3d 453, 462 (9th Cir. 2001).

7 Because the ALJ properly supported his Step Five findings with substantial evidence, the  
8 ALJ met his burden at Step Five to demonstrate Plaintiff was able to perform work existing in  
9 significant numbers in the national economy.

10 V. Whether the ALJ Erred by Failing to Consider Plaintiff's PTSD a Severe Impairment  
at Step Two of the Sequential Evaluation

11 Throughout Plaintiff's briefing, Plaintiff notes the ALJ did not assess whether Plaintiff's  
12 PTSD was a severe impairment at Step Two of the sequential evaluation. *See, e.g.*, Dkt. 13, pp.  
13 6-8. However, Plaintiff only discusses this issue to argue the ALJ should have obtained more  
14 mental health opinion evidence, or to argue Plaintiff met the requirements of an unspecified  
15 mental health listing. *Id.* Plaintiff does not identify a Step Two issue in the opening section of his  
16 brief as he was required to do by this Court's scheduling order, does not discuss the Step Two  
17 standard at all in his briefing, and does not argue how any error in the ALJ failing to discuss  
18 whether Plaintiff's PTSD was severe was harmful at Step Two. To the extent Plaintiff was  
19 attempting to argue a Step Two error, Plaintiff has the burden of demonstrating harmful error,

1 and Plaintiff's failure to articulate this argument with sufficient specificity means it is waived.

2 See *Sanders*, 556 U.S. at 410. See also *Greger*, 464 F.3d at 973, *Bisuano*, 584 Fed.Appx. at 514.<sup>6</sup>

3 **CONCLUSION**

4 Based on the above stated reasons and the relevant record, the undersigned finds the ALJ  
5 properly concluded Plaintiff was not disabled. Therefore, the Court orders this matter be  
6 affirmed pursuant to sentence four of 42 U.S.C. § 405(g). Judgment should be for Defendant and  
7 the case should be closed.

8 Dated this 31st day of January, 2017.

9   
10

11 David W. Christel  
United States Magistrate Judge

22 \_\_\_\_\_  
23 6 Nothing about this decision would prevent Plaintiff from re-arguing his PTSD was a  
24 severe impairment in a new application. The Court notes Plaintiff's insurance status does not  
expire until June 30, 2017. AR 21.